

No. 94798-8

Supreme Court No. _____

No. 76000-9-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Dependency of:

E.H. (dob. 12/06/07),

A minor child.

MOTION FOR DISCRETIONARY REVIEW

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A. IDENTITY OF PETITIONER

Ramona R., petitioner below, seeks review of the Court of Appeals decision designated in Part B.

B. COURT OF APPEALS DECISION

Ms. R. sought discretionary review of the King County Juvenile Court order denying Ms. R.'s motion to revise the court commissioner's order denying the appointment of counsel for Ms. R.'s son, E.H. The Court of Appeals Commissioner affirmed the order on March 30, 2017. Appendix A. Ms. R.'s motion to modify was denied by the Court of Appeals on June 22, 2017. Appendix B. This motion is based upon RAP 13.3(e) and 13.5A.

C. ISSUES PRESENTED FOR REVIEW

1. This Court has recognized that children have fundamental liberty interests in termination of parental rights proceedings. The Fourteenth Amendment requires that in termination cases, a case-by-case analysis must be conducted using the three-part Mathews v. Eldridge framework, to determine whether counsel is required for a child in a termination case. Did the juvenile court misapplication of the Mathews test violate constitutional due process, and was the Court of Appeals affirmance therefore in conflict with decisions of this Court, and does it

raise a significant question of law under the Constitution, requiring review? RAP 13.4(b)(1), (3).

2. In State v. Gunwall, this Court articulated standards by which Washington's constitution may provide broader protection than does the United States Constitution. Was the juvenile court's Gunwall analysis erroneous, and did the Court of Appeals err in affirming the lower court's decision, when it held Article I, Section 3 not to be broader than the Fourteenth Amendment? This Court should grant review, finding Article I, Section 3 is more protective of children than the federal constitution. RAP 13.4(b)(1), (3).

D. STATEMENT OF THE CASE

a. Family History

Petitioner Ramona R. is the mother of six children, who were between the ages of five and 17 years old at the time of her motion for the appointment of counsel for her nine year-old son E.H. Appendix C to MDR; Appendix F to MDR (Motion for Appointment of Counsel for Dependent Child at Public Expense). The children were found dependent due to the actions of a third party, after they were no longer living with Ms. R. Id.

Two years earlier, when Ms. R. learned she was facing a federal sentence in California, she arranged for her children to live with a

family friend in Washington during her incarceration. Appendix C to MDR at 3.¹ The children are roughly divided into two groups, based upon their ages; at the time of the underlying motion for counsel, the older three boys were between the ages of 14 and 17, and the younger three children were between the ages of five and nine. Id. E.H., at age nine, is the oldest of the younger group of children. Id.

Four months after Ms. R. left Washington to serve her sentence, the family friend who was caring for the children sent the older three boys to live with another individual. Id. In the new home, the older three boys unfortunately suffered serious physical and psychological abuse. Id. The Department of Social and Health Services (Department) removed the three older boys and acknowledged “the mother was not aware of this abuse.” Id.

A safe placement was found for the older three boys. Id. Since that time, the younger three children have been shuttled among various foster care placements. Id.; Appendix D to MDR. These placements included several foster homes, a motel room with a social worker and, for a time, the children’s teacher’s home. Id.

¹Ms. R.’s expected release date is July 2019. App. A to MDR at 9; App. D to MDR at 4.

Meanwhile, Ms. R. has pursued parenting classes while incarcerated in California and Washington, has followed the disciplinary expectations and guidelines of her facilities, and has worked diligently on her compassionate release application. Appendix D to MDR at 4. Ms. R. calls her children approximately twice each week and sends cards and letters. *Id.* at 7; Appendix H to MDR. The juvenile court has found her in full compliance with the services offered. Appendix H to MDR at 30. The juvenile court found her participation in the “many services and programs available to her” to be “considerable” and “notable.” Appendix E MDR.

Ms. R. has also participated in liberal in-person visitation with her children during several furloughs throughout her incarceration, conducted at the maternal grandfather’s home, as well as at various local recreation areas. Appendix A to MDR at 2; Appendix E to MDR (visitation at Coulon Park and local water park with younger children, with overnights permitted for older three children).

b. Motion for Counsel

In August 2016, Ms. R. moved for counsel on behalf of her nine year-old son, E.H. Appendix F to MDR.² In support of her motion,

² The older three children are already represented by counsel, and no motion was made on behalf of the younger two children, ages five and six.

Ms. R. argued the Washington and United States Constitutions require appointed counsel for similarly situated children. Id.

Ms. R. also argued that E.H.'s interests were not adequately protected by the Court-Appointed Special Advocate (CASA), who was volunteering in a non-attorney guardian ad litem (GAL) capacity, on behalf of all three younger children. Id. at 2-3; Appendix G to MDR at 3. E.H. has fervently expressed his wish to return to his mother as soon as possible following her incarceration; E.H. is also the only child in the younger group of siblings to be placed alone. Appendix F to MDR.³ However, the CASA has advocated for the termination of Ms. R.'s parental rights as to the three younger children. Id. The CASA therefore does not represent E.H.'s stated interests.

c. Decision on Review

On September 1, 2016, the juvenile court Commissioner denied Ms. R.'s motion for appointment of counsel for E.H. Appendix B to MDR. The Commissioner found that the CASA advocates strongly for

³ The CASA argued below and at the Court of Appeals that a guardianship was recommended as an alternative permanent plan in May 2016. Appendix G to MDR at 2. According to the CASA, this was "out of respect for [E.H.]'s wishes to be reunited with his mother." Id. A guardianship is not actually E.H.'s wish, however.

E.H.'s best interest, informs the court of E.H.'s stated interest, and that there is no evidence the child's desires are not being met. Id.

On October 11, 2016, the Honorable Helen Halpert denied the mother's motion for revision. Appendix A to MDR. Following a full Gunwall⁴ analysis, the court held that there is no independent basis under Article I, section 3 to appoint counsel for children in dependency proceedings. Id. at 6-7. The court applied a case-by-case analysis based on the three-part test of Mathews v. Eldridge,⁵ and concluded federal due process also does not require the appointment of counsel for E.H. "at this time." Appendix A to MDR.

Ms. R. sought discretionary review in the Court of Appeals. Following oral argument, the Court of Appeals Commissioner denied review on March 30, 2017. Appendix A. A motion to modify was denied by the Court of Appeals on June 22, 2017. Appendix B.

The mother seeks review in this Court. RAP 13.4(b)(1), (3).

⁴ State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

⁵ Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

THIS COURT SHOULD GRANT REVIEW, AS THE COURT OF APPEALS DECISION IS IN CONFLICT WITH DECISIONS OF THIS COURT, AND A SIGNIFICANT QUESTION OF LAW UNDER THE CONSTITUTION IS INVOLVED. RAP 13.4(b)(1), (3).

1. This Court should grant review because the juvenile court misapplied the *Mathews* factors when it concluded federal due process did not require the appointment of counsel for the child.

This Court examined the issue of whether children have the right to counsel in termination cases under the Fourteenth Amendment's due process clause in In re Dependency of M.S.R., 174 Wn.2d 1, 271 P.3d 234 (2012). There, the Court recognized that "children have fundamental liberty interests at stake in termination of parental rights proceedings." M.S.R., 174 Wn.2d at 20. The children's interests include: "being free from unreasonable risks of harm and a right to reasonable safety;" "maintaining the integrity of the family relationships, including the child's parents, siblings, and other familiar relationships;" and "not being returned to (or placed into) an abusive environment over which they have little voice or control." Id.

Following the case-by-case three-part Mathews framework, largely premised on the United States Supreme Court decision in Lassiter, this Court also stated that a different analysis might be

required during the dependency phase of a case. Id. at 22 n.13.

Following Lassiter and employing the Mathews balancing factors, M.S.R. held that “children have at least the same due process right to counsel as do indigent parents subject to dependency proceedings as recognized by the United States Supreme Court in Lassiter.” M.S.R., 174 Wn.2d at 20. Hence, the predecessor to RCW 13.34.100(7),⁶ which gave courts discretion to appoint children counsel, did not violate due process under the Fourteenth Amendment. M.S.R., 174 Wn.2d at 21-22.

Before Lassiter, this Court held article I, section 3 mandated appointment of counsel to parents in dependency and termination proceedings. In re Welfare of Luscier, 84 Wn.2d 135, 137, 524 P.2d 906 (1974) (termination cases); In re Welfare of Myricks, 85 Wn.2d 252, 255, 533 P.2d 841 (1975) (dependency cases). See In the Matter of the Dependency of M.H.P., 184 Wn.2d 741, 759, 364 P.3d 94 (2015) (declining to “revisit the state constitutional component of Luscier”); In re Dependency of G.G., Jr., 185 Wn. App. 813, 826 & n.18, 344 P.3d

⁶ Former RCW 13.34.100(6); Laws of 2010, ch. 180. In 2014, the Legislature expanded the right of children to counsel post-termination by requiring that counsel be appointed if the dependency case is still ongoing and there has been no remaining parent with parental rights for six months. RCW 13.34.100(6)(a).

234 (2015) (recognizing the continuing “vitality of the due process based right to counsel in termination proceedings” under article I, § 3).

As set forth below, E.H. was entitled to counsel upon his mother’s motion, under both the federal and state constitutions.

2. Given the interests at stake and the risk the procedures used will lead to erroneous decisions, the federal due process clause required that E.H. be appointed counsel.

E.H. was erroneously denied counsel under the Fourteenth Amendment. In M.S.R., the Supreme Court directed that, when the issue is raised in the trial court, the court, “subject to review, should apply the Mathews factors to each child’s individual and likely unique circumstances to determine if the statute and due process requires the appointment of counsel.” M.S.R., 174 Wn.2d at 20-22 (emphasis provided).

Questions of due process are constitutional issues reviewed de novo. See, e.g., Currier, 295 P.3d at 842 (de novo review applied to trial court’s application of Mathews factors and to court’s decision that party was entitled to counsel in civil contempt proceeding).

A child’s fundamental liberty interest in a dependency proceeding is great. M.S.R., 174 Wn.2d at 15, 16; Kenny, 356 F. Supp. 2d at 1360 (recognizing significant liberty interest of child). During a dependency, a

child may repeatedly be moved from one foster home or institution to another. M.S.R., 174 Wn.2d at 15-16. This movement may cause significant harm. Braam v. State, 150 Wn.2d 689, 694, 699, 81 P.3d 851 (2003) (recognizing substantive due process right “to be free from unreasonable risk of harm . . . and a right to reasonable safety.”). Hence, “even when a child’s natural home is imperfect, permanent removal from that home will not necessarily improve his welfare.” Santosky v Kramer, 455 U.S. at 745, 102 S.Ct 1388, 71 L.Ed.2d 599 (1982).

E.H.’s dependency commenced when one of E.H.’s older brothers was victimized by a third party, not by Ms. R. Appendix F to MDR. E.H. is extremely bonded with his mother and asks during visits when he can come home with her to live. Id. at 2. He speaks with his mother by phone weekly and receives mail from his mother regularly. Id. The Foster Care Assessment Program (FCAP) visitation report noted E.H.’s sadness and despondency at a recent visit during his mother’s furlough, expressing how much he misses Ms. R. Id. (Ex. A at 7). The FCAP report also noted Ms. R.’s positive parenting skills with her children. Id.

Despite this clear bond and expressed intent, the CASA has advocated for termination of Ms. R.’s parental rights, arguing it is in E.H.’s best interest. Appendix G to MDR at 2-3. This conflict with E.H.’s own goals weighs in favor of appointment of counsel for E.H., due to the high

risk of error. See Mathews v. Eldridge, 424 U.S. at 335.

“[T]here are many circumstances when counsel for a child would be extremely valuable.” M.S.R., 174 Wn.2d at 19. “[T]he older, more intelligent, and mature the child is, the more impact the child’s wishes should have, and a child of sufficient maturity should be entitled to have the attorney advocate for the result the child desires.” In re A.T., 744 N.W.2d 657, 663 (Iowa Ct. App. 2007) (citing Gary Soloman, Role of Counsel in Abuse and Neglect Proceedings, 192 Prac. Law Inst. Crim. Law and Urb. Prob. 543, 550 (2003)). “Age seven is viewed by some advocates as the appropriate separation between the need for a client-directed attorney and a best interests’ attorney.” A Child’s Right to Counsel: A National Report Card on Legal Representation for Abused & Neglected Children, 12 n.14 (3rd. ed. 2012) (internal citations omitted).

Here, when the mother moved for counsel for E.H. in August 2016, the child was almost nine years old. Appendix F to MDR. E.H. was old enough to express his interest and to assist an attorney. He could have provided relevant information to the court through counsel, as easily as he did to his CASA, if not more so. See Appendix A to MDR at 10 (noting E.H. is “slow to trust and to open up”).

Moreover, our Legislature has recognized that attorneys are unique in what they can provide to children through legal representation. Laws of

2010, ch. 180 § 1 (legislative findings accompanying amendment to RCW 13.34.100) (cited and discussed in Motion for Discretionary Review).

Here, there was much that an attorney could have done. An attorney would have advocated for a resolution consistent with E.H.'s *actual*, stated interests. An attorney might have focused the court's attention on E.H.'s interest in reunification, rather than a plan of a guardianship or a termination petition – both permanency plans suggested to the court by this CASA. Appendix G to MDR; Appendix H to MDR at 15. An attorney also could have advocated for visits with his older brothers, a strong desire of E.H., not necessarily shared by the younger two siblings – both of whom the CASA also represents. Appendix F to MDR (Ex. A at 7). Unlike the CASA, it would be unethical for an attorney to represent more than one party in the action, due to this inherent conflict of interest. See RPC 1.7.

Because E.H. was old enough to express his wishes and counsel would have brought unique value to the proceedings, the court's opinion that there was little risk of error was erroneous. The Court of Appeals Commissioner erroneously affirmed the juvenile court's conclusion that "with or without counsel, E.H. would be in foster care." Appendix A at 7. This oversimplification of the benefits that counsel would provide to the child quite misses the point of the right to counsel. The child's "zealous"

CASA is working against E.H.'s stated interests at this time, in that the CASA is advocating for a guardianship petition. Appendix G to MDR.

The court's conclusions indicate its confusion between the roles and ethical duties of guardians ad litem and licensed attorneys.⁷ For example, the lower court suggests that the CASA's attorney somehow adequately protects E.H.'s interests, while clearly the ethical duty of the CASA's attorney is to her own client – the CASA – and not to the child. Nor does the CASA's attorney share a confidential relationship with anyone but her own client, the CASA. See Appendix A to MDR at 10; Appendix F to MDR, Ex. B (WSBA Resolution).

Here, the interest in protecting E.H. far outweighed any administrative or fiscal burden that appointment of counsel for him might have entailed. See Kenny A., 356 F. Supp. 2d at 1361; Stukenberg v. Abbott, 2017 WL 74371 at *9-10 (U.S. District Ct. Texas, Jan. 9, 2017).⁸ In Stukenberg, the Southern District Court of Texas recently certified a class of long-term foster children and found these “most vulnerable citizens ... are entitled to counsel at every step of their legal journey

⁷ See, e.g., Laws of 2010, ch. 180 § 1 (legislative findings accompanying amendment to RCW 13.34.100); Appendix A (including exhibits); see also https://apps.americanbar.org/litigation/committees/childrights/docs/aba_model_a_ct_2011.pdf (last accessed January 24, 2017).

⁸ Citation is pursuant to GR 14.1; case is cited as persuasive authority.

through the Texas foster care system.” Id. The court deemed the children’s lack of counsel a “constitutional deficiency.” Id. at *10.

This court should grant review, because due process required granting Ms. R.’s motion to appoint counsel for her son. Accordingly, due to the juvenile court’s failure to properly apply the Mathews factors, the court violated constitutional due process, requiring this Court’s review. RAP 13.4(b)(1), (3).

3. This Court should find that Article I, § 3 provides greater protection to children in dependency proceedings than does the Fourteenth Amendment.

The juvenile court erred when it concluded the protections of Article I, Section 3 are no broader than the provisions of the Fourteenth Amendment. Appendix A to MDR at 2, 7 (citing E.S., 171 Wn.2d 695). This question remains open after M.S.R.⁹ Because the juvenile court’s decision was inconsistent with legal precedent that children have a categorical right to counsel in termination proceedings under article I, § 3, the court’s decision was erroneous, and the Court of Appeals affirmance should be reviewed by this Court. RAP 13.4(b)(1), (3).

In Gunwall, this Supreme articulated standards to decide when and

⁹ This Court declined to reach the state constitutional issue in M.S.R. 174 Wn.2d at 20 n.11 (citing State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986)).

how Washington's constitution may provide broader protection than does the United States Constitution. 106 Wn.2d 54. The court examines six nonexclusive criteria: (1) the text of the state constitutional provision, (2) the differences in the texts of the parallel state and federal provisions, (3) state constitutional history, (4) pre-existing state law, (5) structural differences between the two constitutions, and (6) matters of particular state interest and local concern. Gunwall, 106 Wn.2d at 61-62.

Ms. R. relies on her detailed Gunwall analysis presented below in the juvenile court, and in the Court of Appeals in Petitioner's Motion for Discretionary Review at 18-26.

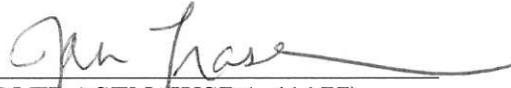
Because this Court should hold that Art. I, Section 3 requires greater protection to children in dependency proceedings such as this, than does the Fourteenth Amendment, the Court of Appeals decision should be granted review. RAP 13.4(b)(1), (3).

F. CONCLUSION

For the above reasons, the Court of Appeals decision should be reviewed, as it is in conflict with decisions of this Court, and it involves a significant question of law under the Constitutions of Washington and the United States. RAP 13.4(b)(1), (3).

DATED this 24th day of July, 2017.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Jan Trasen", written over a horizontal line.

JAN TRASEN (WSBA 41177)
Washington Appellate Project
Attorneys for Petitioner

APPENDIX A

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

In the Matter of the Dependency of)	
)	
E.H.,)	
DOB: 12/6/07,)	No. 76000-9-I
)	
Minor Child.)	
)	COMMISSIONER'S RULING
RAMONA RIGNEY,)	DENYING DISCRETIONARY
)	REVIEW
Petitioner,)	
)	
v.)	
)	
STATE OF WASHINGTON,)	
DEPARTMENT OF SOCIAL AND)	
HEALTH SERVICES,)	
)	
Respondent.)	

Ramona Rigney, the mother of E.H., seeks discretionary review of the trial court order denying her motion to revise the superior court commissioner's ruling denying the appointment of counsel for E.H. For the reasons stated below, review is denied.

Ms. Rigney is the mother of six children. The older three boys are between the ages of fourteen and seventeen. The younger two children are ages five and six. E.H. is nine years old. Ms. Rigney is incarcerated in a federal prison in California and has a current release date of 2019.¹ She has regular contact with the children, including phone calls and letters, and has had

¹ Release to a halfway house in January 2018 is a possibility.

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some furlough visits in Washington. She is in compliance with services offered. E.H. has not lived with her since 2013. In 2014 the court granted the petition of the Department of Social and Health Services (Department) to find the children dependent due to the actions of a third party. E.H. has lived in his current foster home since 2015.

In July 2015 the court appointed a Special Advocate (CASA) for E.H. and his two younger siblings. The CASA has been active in working with the children and representing them in court proceedings. She sees E.H. on a regular basis and communicates directly with his service providers. E.H. has been diagnosed with anxiety disorder and adjustment disorder. He feels safe in his current foster home. In February 2016, the CASA supported a primary plan of adoption for E.H. In May 2016, in deference to E.H.'s wishes to maintain a relationship with his mother, the CASA recommended a guardianship as the permanent plan rather than termination of parental rights. As of September 2016, the primary permanency plan was for adoption or guardianship, with an alternate plan of returning to the mother. E.H. has expressed his wish to be reunited with his mother and return home when she is released.

In August 2016, Ms. Rigney filed a motion to have counsel appointed to represent E.H.² The Department and the CASA opposed the request. A superior court commissioner denied the motion. Ms. Rigney sought revision, arguing that both the United States Constitution and the Washington

² The three older boys have counsel because they are over the age of twelve, and Ms. Rigney did not seek counsel for the two younger children.

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Constitution require appointed counsel for E.H. She also argued that E.H.'s interests are not adequately protected by his CASA, who does not believe that a return to his mother is in E.H.'s best interests.

The trial court denied revision in a thorough, carefully reasoned memorandum decision. The court first ruled that application of the six Gunwall³ factors does not lead to the conclusion that Art. 1 section 3 requires appointment of counsel for all dependent children and that the proper analysis remains the case-by-case analysis employed by the court in In re Dep. of M.S.R., 174 Wn.2d 1, 271 P.3d 234 (2012), based on the three part test of Mathews v. Eldridge, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976):

First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Memorandum Decision at 8. The court applied this test, ruling in part:

It is unclear what additional value appointment of counsel for [E.H.], a child not yet nine years of age, would provide. [The CASA] has been actively involved in [E.H.'s] case. The expectation is that the mother will be in federal custody until July 2019. [The CASA] has been forthright in explaining that [E.H.] wishes to live with his mother when she is released from prison and until then wishes to remain in his current foster placement. [The CASA] has recommended alternative plans of guardianship and adoption, as the permanent plans for [E.H.]. Although it is clear that [the CASA] is somewhat leery of making this recommendation for guardianship, she is doing so out of deference to [E.H.'s] stated wishes to ultimately return to his mother. [E.H.'s] voice is not going unheard in these proceedings.

...

³ State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

In her September 1, 2016 report, [the CASA] indicated that [E.H.] is slow to trust and to open up. He has had many adults in and out of his life since 2013, when his mother was first incarcerated. He does not like being “called out” as a foster child. An attorney would be one more person that [E.H.] would need to integrate into his life.

The court sees no benefit to [E.H.] in appointing counsel at this juncture. There is no alternative, at this point, to [him] remaining a dependent child. Neither parent is available to care for him. His CASA is zealous in ensuring his well-being. Given the current posture of the case, it is unclear what counsel could contribute that a conscientious CASA represented by an attorney cannot. With or without counsel, [E.H.] would be in foster care.

That is not to say some children might not benefit from appointment of counsel. A child who is being subjected to frequent placement disruptions, who has complex mental health needs, or who needs assistance in accessing supportive educational advices might benefit by [an] attorney. Similarly, a child where reunification is on a shorter time line may need particular legal assistance in understanding the court process. However, none of these variables are now at play in [E.H.’s case].

When all three Mathews factors are considered, the court is satisfied that due process does not require appointment of counsel for [E.H.].

Ms. Rigney seeks discretionary review under RAP 2.3(b)(2), probable error that substantially alters the status quo or substantially limits her freedom to act.⁴ In proceedings under chapter 13.34 RCW, the court may, but is not required, to appoint counsel for children.⁵ RCW 13.34.100(7), Juvenile Court Rule (JuCR) 9.2(c)(1). In deciding whether to appoint counsel, the court conducts the three-part balancing test of Mathews. M.S.R., 174 Wn.2d at 14-15. This court reviews the trial court decision under the abuse of discretion

⁴ She also seeks review under RAP 2.3(b)(3) (trial court has so far departed from the accepted and usual course of proceedings as to call for appellate review).

⁵ By contrast, the court is required to “appoint an attorney for a child in a dependency proceeding six months after granting a petition to terminate the parent and child relationship pursuant to RCW 13.34.180 and when there is no remaining parent with parental rights.” RCW 13.34.100(6)(a).

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standard. M.S.R., 174 Wn.2d at 11-12. Thus, Ms. Rigney must show probable error in light of the abuse of discretion standard.

Ms. Rigney argues that the trial court misapplied the Mathews test. Specifically, she argues that E.H. is very bonded to his mother and asks when he can live with her; that despite this the CASA has advocated for termination of the mother's parental rights; that this conflict with E.H.'s wishes weighs in favor of appointing him counsel; that E.H. is old enough to express his interest and to assist an attorney; that attorneys are unique in what they can provide children through legal representation; that the presence of the CASA does not adequately mitigate the risk of error; and that there is much an attorney could have done to advocate for E.H.

Ms. Rigney's argument fails. A CASA is obligated to advocate both for the child's best interest as well as the child's stated interest. RCW 13.34.105(1)(b), (f). M.S.R., 174 Wn.2d at 20 (CASA is required to inform the court of any views or positions expressed by the child on issues before the court). Here, as the trial court found, the CASA was clear in informing the court of E.H.'s wish to return to his mother when she is released; the CASA also expressed her opinion that return home is not in E.H.'s best interests. The court also considered other factors that weighed against appointing counsel. And finally, the court specifically noted that appointing counsel *at this time* would not benefit E.H. Ms. Rigney has not shown the trial court probably

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abused its discretion in its application of the Mathews factors and decision to deny the mother's motion to appoint counsel for E.H.

Ms. Rigney also argues that the trial court erred in ruling that Art. 1 section 3 does not provide greater protection to children in dependency proceedings than does the Fourteenth Amendment. As noted above, under RCW 13.34.100(7), the court may, but is not required, to appoint counsel for children. In M.S.R., the Washington Supreme Court did not reach the issue because the parties had not provided the appropriate Gunwall analysis. 174 Wn.2d at 20 n.11. Here, the mother provided a Gunwall analysis in the trial court and in this court. The issue of whether Art. 1 section 3 requires greater protection than the Fourteenth Amendment is important and will eventually be addressed by an appellate court. The issue is currently pending in a Division II case, In re Dep. of S.K.-P., No. 48299-1-II (argued November 1, 2016).

But Ms. Rigney has not met the probable error standard warranting discretionary review. The court presumes that a statute is constitutional, and a party who challenges a statute must show beyond a reasonable doubt that the statute is unconstitutional. Amunrud v. Bd. of Appeals, 158 Wn.2d 208, 215, 143 P.3d 571 (2006). Where a case can be decided on nonconstitutional grounds, the court refrains from reaching the constitutional issue. Isla Verde Int'l Holdings, Inc. v. City of Camas, 146 Wn.2d 740, 752, 49 P.3d 867 (2002). In several recent unpublished decisions, this court has declined to consider the argument that Art. 1 section 3 provides a broader due process right to counsel

No. 76000-9-1/7

than the Fourteenth Amendment and requires the universal appointment of counsel to represent a child in a dependency proceeding. Instead the court has held that even assuming that the trial court decision not to appoint counsel violated Art. 1 section 3, the error was harmless beyond a reasonable doubt because even if an attorney had advocated for the children's wishes, the evidence nevertheless supported termination of parental rights.⁶

A similar analysis applies here. The trial court reasoned that at this time there was no benefit to appointing counsel for E.H. Neither of his parents are available to care for him, and there is presently no alternative to him remaining a dependent child. His CASA is zealous in ensuring his well-being and has informed the court of E.H.'s wish to return to his mother's care when she is released in 2019. The court noted that given the posture of the case, it is unclear what counsel could contribute that the conscientious CASA could not; for now, with or without counsel, E.H. would be in foster care.

Therefore, it is

ORDERED that discretionary review is denied.

Done this 30th day of March, 2017.



Court Commissioner

2017 MAR 30 PM 2:08
COURT OF APPEALS DIV 1
STATE OF WASHINGTON

⁶ In re Dep. of A.B., No. 74722-3-I, slip. op. ___ Wn. App. ___, ___ P.3d ___ (March 27, 2017); In re Dep. of A.D.R., No. 74351-1-I, 2017 WL 571079; In re Dep. of M.B.S., No. 74002-4-I (December 12, 2016), 2016 WL 7209857.

APPENDIX B

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

In the Matter of Dependency)
E.H. (d.o.b. 12/06/07), minor child,)
)
WASHINGTON STATE DEPARTMENT)
OF SOCIAL & HEALTH SERVICES,)
)
Respondent,)
v.)
)
RAMONA RIGNEY,)
)
Petitioner.)

No. 76000-9-I

ORDER GRANTING
EXTENSION OF TIME TO
FILE MOTION TO MODIFY
AND DENYING MOTION TO
MODIFY

Petitioner Ramona Rigney has filed a motion to extend the time to file a motion to modify and a motion to modify the commissioner's March 30, 2017 ruling denying discretionary review. The State of Washington, Department of Social and Health Services, and the Court Appointed Special Advocate have each filed answers. We have considered the motions under RAP 18.8(a) and RAP 17.7 and have determined that the motion for an extension of time should be granted and the motion to modify should be denied.

Now, therefore, it is hereby

ORDERED that the motion to extend time to file the motion to modify is granted;

it is further

ORDERED that the motion to modify is denied.

Done this 22nd day of June, 2017.

Speer, J.

Schubert, J.

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2017 JUN 22 AM 10:40

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, a true copy of the **Motion for Discretionary Review to the Supreme Court** was filed in the **Court of Appeals** under **Case No. 76000-9-1**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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[SHSSeaEF@atg.wa.gov] [kellyt1@atg.wa.gov]

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appellant

Attorney for other party


MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: July 24, 2017

WASHINGTON APPELLATE PROJECT

July 24, 2017 - 4:55 PM

Transmittal Information

Filed with Court: Court of Appeals Division I
Appellate Court Case Number: 76000-9
Appellate Court Case Title: In re the Dependency of: E.H. DOB: 12/06/07 Ramona Rigney, Petitioner vs. DSHS, Respondent
Superior Court Case Number: 14-7-01413-7

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